

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_

NATIONAL SKI AREAS  
ASSOCIATION, INC.

Plaintiff,

v.

UNITED STATES FOREST SERVICE,  
an agency of the United States  
Department of Agriculture,

and

UNITED STATES DEPARTMENT OF  
AGRICULTURE,

and

HARRIS SHERMAN,  
Under Secretary for Natural Resources  
and Environment of United States  
Department of Agriculture,

Defendants.

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**COMPLAINT FOR JUDICIAL REVIEW AND INJUNCTIVE RELIEF**

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**INTRODUCTION AND SUMMARY**

1. This is a complaint for judicial review of a final agency action under the Administrative Procedure Act (“APA”), to wit: the United States Forest Service’s (“Forest

Service”) stunning and unprecedented directive to its employees that they insert new conditions into ski area permits to control and seize privately owned water rights acquired and used under state law by ski area operators at ski areas on National Forest System lands throughout the United States. This lawsuit requests the Court hold unlawful and issue a nationwide injunction to set aside the directive under the APA, 5 U.S.C. § 706(2), because it is arbitrary, capricious, in excess of the Forest Service’s statutory authority, compels an uncompensated taking of private property, and was adopted without public notice or an opportunity to comment as required by the APA and by the National Forest Management Act (“NFMA”).

2. The final agency action here is Interim Directive Number 2709.11-2011-3 issued by Associate Deputy Chief of the Forest Service James M. Peña on November 8, 2011 without public notice or an opportunity for public comment as part of the Forest Service Handbook (“2011 Directive”). The 2011 Directive is attached as Exhibit 1.

3. The 2011 Directive instructs Forest Service employees to insert into ski area special use permits a seven-page clause – called Clause D-30 – that dramatically alters the settled legal regime governing water rights at ski areas on National Forest System lands. The conditions of Clause D-30 mandated by the 2011 Directive will produce permanent legal consequences that extend beyond the 40-year term of ski area special use permits.

4. The seven-page 2011 Directive:

a. Compels ski area permit holders to permanently assign or quit claim to the United States Government privately owned water rights without payment of compensation by the United States;

b. prohibits ski area operators from selling water rights used at the ski area to anyone except the future ski area operator, even water rights that the ski area obtains from private lands or lands miles away from the ski area;

c. requires ski area permit holders to permanently assign water rights to the Forest Service to which the Forest Service believes it was entitled under long expired ski area permits to which the current permit holders were never subject;

d. significantly reduces the economic value of water rights acquired by ski area operators at great expense;

e. forces ski area permit holders to grant the Forest Service a power of attorney so that the Forest Service itself can execute necessary documents to seize, control, and transfer the permit holders' water rights to the Forest Service;

f. requires ski area permit holders to waive any legal claim for compensation against the United States for privately owned water rights seized, taken, and subject to compelled transfer under the 2011 Directive; and

g. requires permit holders to use water rights solely in support of the ski area, but permits the Forest Service to use such water rights for other purposes.

5. The 2011 Directive defies statutory directives from Congress that the Forest Service defer to and follow state law for private water rights obtained from and used on National Forest System lands.

6. The 2011 Directive is contrary to federal policies instructing the Forest Service to respect private property rights arising under state law in water rights.

7. The Forest Service purported to authorize itself to take the actions required by the 2011 Directive. No legislation authorizes the Forest Service to use its ski area special use permit authority to exercise dominion and control over water rights arising under state law. No statute authorizes the Forest Service to condition the issuance of a ski area special use permit on the permit holder assigning its water rights to the Forest Service. No statute authorizes the Forest Service to prohibit a ski area permit holder from transferring its water rights obtained under state law to anyone except the successor permit holder. No statute authorizes the Forest Service to force ski area permit holders to execute a power of attorney to empower the Forest Service to assign the ski area's water rights to itself. No statute authorizes the Forest Service to condition the issuance of a ski area special use permit on the permit holder waiving its claim that the permit conditions amount to a taking without compensation in violation of the Fifth Amendment to the United States Constitution.

8. The Forest Service purported to authorize itself to take the actions required by the 2011 Directive without accounting to the citizens of the United States, without public notice, and without requesting and responding to the views of state and local governments. That action violated mandatory federal statutory procedures that require citizen involvement and public accountability in the development of new law, specifically the public notice and comment obligations of the APA, 5 U.S.C. § 553, and the NFMA, 16 U.S.C. § 1612(a).

9. The 2011 Directive is binding on Forest Service employees who have no discretion except to apply it. Since the Forest Service issued the 2011 Directive on November 8,

2011, Forest Service employees have inserted the provisions of the 2011 Directive in three separate ski area special use permits without modification.

10. The Court should issue a nationwide injunction to enjoin the Forest Service's application of the 2011 Directive.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

13. The 2011 Directive is final agency action within the meaning of 5 U.S.C. § 704.

14. This Court has authority to review the 2011 Directive under the APA, 5 U.S.C. § 706.

### **PARTIES**

15. Plaintiff National Ski Areas Association, Inc. ("NSAA") is a not-for-profit trade association in Lakewood, Colorado for ski area owners and operators in the United States. NSAA represents 321 alpine resorts that account for more than ninety percent of the annual skier and snowboarder visits nationwide, including twenty-five resorts within Colorado, twenty-one of which operate on National Forest System lands under special use authorization from the Forest Service. Nationwide, 121 ski areas operate on National Forest System lands. NSAA members with Forest Service special use permits must obtain new permits from time to time, including when they acquire a ski area on National Forest System lands, when the term of a permit expires, when permit boundaries are adjusted, or when an existing permit holder changes its legal status such as from a corporation to a limited liability company.

16. The 2011 Directive injures NSAA members that currently hold Forest Service ski area special use permits or that are likely to hold such permits in the future. Ski area permit holders obtain water rights under state law at great expense and effort. The 2011 Directive injures such NSAA members in many ways, including by: significantly reducing the value of water rights NSAA members have acquired under state law at great expense; mandating that NSAA members assign water rights to the United States as a condition of a ski area special use permit; prohibiting NSAA members with ski area special use permits from transferring solely-owned water rights obtained from private lands to anyone except a successor ski area operator; prohibiting NSAA members with ski area special use permits from exercising legal and property rights arising under state law associated with water rights; compelling NSAA members to waive legal claims against the Forest Service for compensation as a condition of obtaining a ski area special use permit; and forcing NSAA members to give the Forest Service a power of attorney to control and transfer water rights obtained by NSAA members as a condition of a ski area special use permit.

17. Intrawest ULC (“Intrawest”), headquartered in Denver, Colorado, is a member of NSAA. Intrawest owns Steamboat Ski Resort, and operates Winter Park Resort, both in Colorado, under special use permits from the Forest Service. Winter Park Resort and Steamboat Ski Resort are members of NSAA. Winter Park and Steamboat own water rights acquired under Colorado state law that are used at the ski areas. Water rights owned by Winter Park and Steamboat are property rights under Colorado law. Winter Park’s special use permit expires in 2013 as it was issued in 1983 under the 1897 Organic Act and the 1915 Term Permit Act. As a

result of the looming expiration of the special use permit, Winter Park's lender, Wells Fargo, requires that Winter Park Resort obtain a new special use permit from the Forest Service by December 31, 2012. The 2011 Directive requires that new special use permits must contain the provisions of water clause D-30 set forth in the 2011 Directive. Intrawest and Winter Park will be forced to accept clause D-30 in order to obtain a new special use permit. Clause D-30 will devalue the water rights associated with the ski area and harm Winter Park's interests because it diminishes the value of the water rights owned by Intrawest and Winter Park, prohibits their transfer and change in use, and mandates that the permit holder assign some water rights to the Forest Service without compensation.

18. CNL Lifestyle Properties, Inc. ("CNL") is a member of NSAA. CNL owns seven ski areas under special use permit from the U.S. Forest Service including Crested Butte Mountain Resort in Colorado, Brighton Ski Resort in Utah, Loon Mountain Recreation Corp. in New Hampshire, Mountain High Resort in California, Stevens Pass in Washington, Sierra-at-Tahoe Snowsports Resort in California, and the Summit at Snoqualmie in Washington. CNL purchased ski areas subject to Forest Service special use permits in 2011, 2010, 2009, and 2008. In each acquisition, CNL was required to obtain a new special use permit from the Forest Service. CNL may acquire one or more ski resorts in 2012 and 2013 which could be subject to Forest Service special use permits. For a ski area subject to a Forest Service special use permit, the Forest Service will require that CNL obtain a new special use permit for the ski area as it did for the seven ski areas identified above. The Forest Service has directed that new special use permits must contain USFS water clause D-30 issued on November 8, 2011. When CNL

acquires a ski area, it typically purchases the water rights currently owned by the ski area as an essential and critical asset included in the purchase. CNL owns water rights under state law that it acquired for use at its ski areas. Water rights acquired under state law are fundamental to the value of any ski area, including a ski area subject to a Forest Service special use permit. CNL considers it essential to own and responsibly manage water rights in order to increase, over time, the economic and recreational contribution made by our resorts. Clause D-30 will devalue the water rights associated with a purchased resort and harm CNL's interests because it diminishes the value of the water rights owned by CNL, prohibits their transfer and change in use, and mandates that the permit holder assign some water rights to the Forest Service without compensation.

19. Defendant United States Forest Service is the federal agency within the United States Department of Agriculture charged with managing ski areas under special use permits on National Forest System lands in compliance with federal laws and regulations including the APA and the NFMA. The Forest Service is responsible for complying with the APA and the NFMA in formulating binding directives for its programs. The Forest Service issued the 2011 Directive.

20. Defendant United States Department of Agriculture is an executive branch agency of which the Forest Service is a part. The Department of Agriculture is responsible for ensuring that its actions comply with federal law, including the APA and NFMA.

21. Defendant Harris Sherman is sued in his official capacity as Under Secretary for Natural Resources and Environment at the United States Department of Agriculture. Defendant



Sherman is responsible for overseeing the Forest Service, and for ensuring that it complies with federal law, including the APA and NFMA.

## **BACKGROUND**

### **Recreation on National Forest System Lands**

22. Congress directed and authorized the Forest Service in the Ski Area Permit Act of 1986 and in other statutes to authorize private entities to provide developed, four-season public recreation at ski areas on National Forest System lands pursuant to long-term special use permits, also called special use authorizations. 16 U.S.C. §§ 497, 497b, 497c; Pub. L. No. 112-46.

23. The Ski Area Permit Act of 1986, as amended in 1996, identifies the compensation due to the United States for a ski area special use permit. See 16 U.S.C. § 497c. Congress did not authorize the Forest Service to demand assignment or joint-ownership of water rights as compensation for, or as a condition of, ski area special use permits.

24. Congress directed the Secretary of Agriculture in the Ski Area Permit Act of 1986 to promulgate rules and regulations applicable to ski area special use permits. 16 U.S.C. § 497b(7), (c). The Department of Agriculture conducted notice-and-comment rulemaking under the APA, 5 U.S.C. § 553, and promulgated such regulations at 36 C.F.R. Part 251 Subpart B.

25. Forest Service ski area special use permits are ordinarily issued for a term of 40 years. 16 U.S.C. § 497b(b)(2).

26. A ski area special use permit holder must obtain a new ski area permit when the term expires.

27. Ski area special use permit terms and conditions are mandatory and binding on the permit holder. The Secretary of Agriculture may cancel the permit for violation of the terms and conditions. 16 U.S.C. §§ 497b(b)(5), 497b(b)(7).

28. The Forest Service uses a standardized form ski area special use permit. The form ski area special use permit has changed over time, but ski area special use permits issued at any point in time are mostly uniform.

29. Forest Service ski area special use permits terminate automatically upon a change in ownership of the permitted facilities. 36 C.F.R. § 251.59. When a ski area permit holder sells a ski area subject to special use authorization, the buyer must obtain a new ski area special use permit from the Forest Service.

### Water Rights

30. The Property Clause of the United States Constitution, U.S. Const. Art. IV, § 3, Cl. 2, permits the United States to regulate federal public lands, however federal land management agencies do not have plenary authority over water resources and water rights arising on federal public lands.

31. Congress has repeatedly directed federal agencies to look to state law rather than federal law for matters involving water rights, including for private rights in water arising on federal public lands. See, e.g., the Mining Act of 1866, 30 U.S.C. § 51; the Act of 1870, 30 U.S.C. § 52; the Desert Land Act of 1877, 43 U.S.C. § 321.

32. In the 1952 McCarran Amendment, 43 U.S.C. § 666, Congress waived sovereign immunity from suit for actions seeking to adjudicate water rights, including a waiver of sovereign immunity from suit for federal claims to reserved water rights held for National Forests. Under the McCarran Amendment, the United States shall “be deemed to have waived any right to plead that the State laws are inapplicable[.]” 43 U.S.C. § 666(a).

33. The United States Supreme Court has held that Congress intended for water rights, even rights to water diverted from federal land, to be governed by state law. See, e.g., United States v. New Mexico, 438 U.S. 696, 702, 98 S. Ct. 3012, 3015 (1978); California Oregon Power v. Beaver Portland Cement, Co., 295 U.S. 142, 155-64, 55 S. Ct. 725, 728-31 (1935).

34. In 1996, Congress created a Federal Water Rights Task Force, P.L. 104-127 § 389(d)(3), in response to a controversy in Colorado over the Forest Service’s attempt to require Forest Service permit holders to relinquish part of their water supply for secondary National Forest purposes as a permit condition.

35. In its August 25, 1997 Report, the Task Force concluded that:

(1) Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits;

(2) . . . the Forest Service may not use its permitting authority to reallocate or otherwise obtain water for National Forest purposes from non-federal water rights which have been or will be recognized in McCarran proceedings; and

(3) The Forest Service must attain the secondary purposes of the National Forests by obtaining and exercising water rights in accordance with state and federal law

and by working with owners of non-federal water rights to achieve National Forest purposes without interfering with the diversion, storage, and use of water for non-federal purposes. . . .

36. The law of many states provides that private interests in water rights are private property.

37. Colorado law, for example, recognizes that the right to the use of water secured by a legal appropriation is real property, and affords water rights protection under state law. The Colorado Constitution provides that “[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.” Colorado Const. art. XVI sec. 6.

38. Under the National Forest Management Act, revisions to land use permits “shall be subject to valid existing rights.” 16 U.S.C. § 1604(l).

39. No statute grants the Forest Service authority to condition the issuance of a ski area special use permit on the assignment to the United States, or the United States’ joint-ownership, of the permit holder’s water rights.

40. No statute grants the Forest Service authority to restrict a water right holder’s right under state law to sever or alienate the water right as a condition of a special use permit.

41. The Forest Service may acquire water rights in the same manner as any other entity pursuant to the laws of the state in which the water rights are acquired. For example, the Forest Service may purchase water rights from their owner if the Forest Service wants to obtain them for use on National Forest Systems lands.

42. No state law authorizes the Forest Service to acquire water rights as a condition of issuing a ski area special use permit.

### The 2004 Special Use Permit Water Clause

43. Prior to 2004, the Forest Service did not compel ski area special use permit holders to assign water rights arising under state law to the Forest Service.

44. On June 21, 2004, the Forest Service revised the water rights clause included in ski area permits. The 2004 Clause is attached as Exhibit 2.

45. The 2004 Clause provides, in relevant part, that “[a]fter June 2004, any right to divert water from the permitted NFS land where the use of such water is on the same permitted NFS land shall be applied for and held in the name of the United States and the holder (hereinafter called the ‘joint water rights’).” (Ex. 2, 2004 Clause F.3.)

46. The 2004 Clause did not require ski area permit holders to assign to the Forest Service water rights obtained from outside the permitted lands. The 2004 Clause provides that it “shall not apply to water rights that are acquired by the permit holder from a source off of the permitted NFS land and transferred to a point of diversion or storage on the permitted NFS land.” (Ex. 2, 2004 Clause F.3.)

47. After June 21, 2004, the Forest Service included the 2004 Clause in ski area special use permits issued under the 1986 Ski Area Permit Act until issuance of the 2011 Directive on November 8, 2011.

### 2011 Directive

48. The Office of the Chief of the Forest Service publishes the Forest Service Handbook under authority delegated by the Secretary of Agriculture. 36 C.F.R. §§ 200.1, 200.3(b), 2004.

49. The Office of the Chief of the Forest Service issues directives in the Forest Service Handbook to manage and control all Forest Service programs and provide administrative direction to Forest Service employees. 36 C.F.R. § 200.4(b)(1).

50. Forest Service employees are required to follow directives in the Forest Service Handbook. Forest Service employees do not have discretion to refuse to follow directives in the Forest Service Handbook. 36 C.F.R. § 200.4(b).

51. The Chief of the Forest Service has delegated authority to the Office of the Deputy Chief of the Forest Service to issue directives in the Forest Service Handbook. 36 C.F.R. §§ 200.1(c), 200.4.

52. On November 7, 2011, the Forest Service Associate Deputy Chief James M. Peña exercised the delegated authority of the Chief of the Forest Service and issued the 2011 Directive, which was effective November 8, 2011. (See Ex. 1.)

53. The Forest Service did not publish the 2011 Directive in the Federal Register.

54. The Forest Service did not provide public notice or an opportunity for public comment on the 2011 Directive within the meaning of the APA, 5 U.S.C. §553, or NFMA, 16 U.S.C. § 1612(a).

55. The Department of Agriculture has not established an administrative appeals procedure applicable to the Forest Service's issuance of the 2011 Directive in violation of the APA and NFMA.

56. The 2011 Directive adds a mandatory clause, "D-30", that Forest Service employees must include in ski area special use permits.

57. The 2011 Directive is binding on Forest Service line officers and employees. See 36 C.F.R. § 251.52. The 2011 Directive leaves Forest Service line officers and employees with no discretion; they must "[i]nclude clause D-30 in the ski area term special use permit." (Ex. 1, 2011 Directive at 3.)

58. The 2011 Directive D-30 clause dramatically affects water rights that ski area permit holders hold or hope to acquire.

59. Under the 2011 Directive, water rights are treated differently depending on where, when, and how they are acquired.

60. For some types of water rights, the 2011 Directive resurrects the terms of the ski area permit in effect at the time the water right was first filed with an administrative or judicial entity, even if the permit in effect at the time the water right was perfected has since expired or otherwise terminated, and a new permit with different terms has taken its place. (Ex. 1, 2011 Directive at 4, 6, F.2.a(2), F.2.b(2).) This may be the case even if the expired or terminated permit was executed by a different party.

61. If the terms of the old permit called for United States ownership, the current permit holder must assign ownership of the water right to the United States, via quitclaim deed if necessary. (Ex. 1, 2011 Directive at 4, F.2.a(3).)

62. For other types of water rights, the 2011 Directive requires the permit holder to apply for joint ownership of the water right, and share ownership with the United States. (Ex. 1, 2011 Directive at 4, F.2.a(1).)

63. These water rights may not be severed from the ski area or modified in any manner unless approved by the Forest Service. (Ex. 1, 2011 Directive at 4, 6, F.2.a(3), F.2.b(2).)

64. For some types of water rights, the permit holder must apply for and acquire the water rights solely in the name of the United States. (Ex. 1, 2011 Directive at 5-6, F.2.b(1).)

65. Although a few types of water rights may be owned solely in the name of the permit holder, in most cases the permit holder may not divide, transfer, or sever its ownership of such water from use on the permitted area, or modify use of the water without Forest Service approval. (Ex. 1, 2011 Directive at 7, F.2.c(1).)

66. For some, and possibly all, types of water rights, the Forest Service need only use the water “primarily” in support of the ski area, and may divert some water for other uses. (Ex. 1, 2011 Directive at 3, 5, 7, F.2.a, F.2.b(1), F.2.d.) On the other hand, the permit holder may not use the water rights subject to the 2011 Directive for any other purposes. (Ex. 1, 2011 Directive at 4, 6, 7, F.2.a(3), F.2.b(3), F.2.c(1), F.2.c(2).)

67. For all types of water rights, upon termination or revocation of the permit, the permit holder must transfer its interest in the water rights, no matter how or when acquired, to



any succeeding permit holder, or to the United States if the use is not reauthorized. (Ex. 1, 2011 Directive at 8, F.2.d.) This applies even to water rights purchased or leased by the permit holder, for which the permit holder paid compensation to another party. It also applies to water acquired by the permit holder through diversion from non-Forest Service land.

68. The permit holder, by executing the permit, grants the United States limited power of attorney to execute any document necessary to transfer the water right to the succeeding permit holder or the United States, or to correct any failure to ensure that the water right is jointly held by the United States and the permit holder as joint tenants with right of survivorship or as tenants in common. (Ex. 1, 2011 Directive at 8-9, F.2.e.)

69. As a condition of receiving the permit, the permit holder must waive any right to compensation against the United States for the transfer of water rights or for restrictions on the dividing, transferring, severing, or modification of any water rights. (Ex. 1, 2011 Directive at 9, F.2.f.)

70. Since the Forest Service issued the 2011 Directive, the Forest Service has issued three ski area special use permits under the 1986 Ski Area Permit Act in connection with the sale and purchase of ski areas. The Forest Service inserted clause D-30 from the 2011 Directive in each of these three ski area permits. Although the 2011 Directive is effective for approximately eighteen months until May 2013, ski area permits that the Forest Service issues with the 2011 Directive D-30 clause are binding and in effect for forty years by operation of statute. 16 U.S.C. § 497b.

## **FIRST CAUSE OF ACTION**

### *The 2011 Directive is a Legislative Rule That the Forest Service Issued Without Public Notice and an Opportunity for Public Comment in Violation of the Administrative Procedure Act*

71. Plaintiff restates and incorporates by reference paragraphs 1-70 above.
72. The Forest Service's issuance of the 2011 Directive was final agency action under 5 U.S.C. § 704.
73. The APA requires agencies to adhere to three steps in promulgating rules: (1) provide notice of the proposed rule; (2) provide an opportunity for public comment; and (3) provide an explanation of the rule ultimately adopted. See 5 U.S.C. § 553(b), (c).
74. The APA's notice-and-comment requirement does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A).
75. The 2011 Directive is a substantive legislative rule subject to the requirements of 5 U.S.C. § 553(b)-(c). It is not an interpretive rule, general policy statement, or rule of agency procedure within the meaning of 5 U.S.C. § 553(b)(3)(A).
76. Through the 2011 Directive, the Forest Service mandates that its line officers and employees include the 2011 Directive language in ski area permits; Forest Service employees have no discretion whether to include it.
77. The Forest Service did not publish notice of a proposed 2011 Directive, and did not provide an opportunity for public comment. The Forest Service did not provide a reasoned explanation of the 2011 Directive after it was issued.

78. The 2011 Directive is invalid, of no legal effect, and contrary to law because it is a legislative rule promulgated adherence to the notice and comment procedures mandated by the APA. 5 U.S.C. §§ 553(b)-(c), 706(2).

## **SECOND CAUSE OF ACTION**

### *The Forest Service Violated the National Forest Management Act Because it Issued the 2011 Directive Without Public Notice and an Opportunity for Public Comment*

79. Plaintiff restates and incorporates by reference paragraphs 1-78 above.

80. The National Forest Management Act mandates that the Forest Service give Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs. 16 U.S.C. § 1612(a).

81. The Forest Service's issuance and administration of special use permits for ski areas on Forest Service lands under the Ski Area Permit Act of 1986 is a Forest Service program within the meaning of 16 U.S.C. § 1612(a).

82. The 2011 Directive applies to the Forest Service ski area program.

83. The 2011 Directive is the formulation of standards, criteria, and guidelines applicable to a Forest Service program subject to the notice, comment, and procedural requirements of 16 U.S.C. § 1612(a). The 2011 Directive mandates that Forest Service employees insert its provisions into ski area special use permits. The provisions of a ski area

special use permit are legally binding upon the permit holder. 16 U.S.C. § 497b(1); 36 C.F.R. §§ 251.52, 251.55, 251.56.

84. The Forest Service did not provide Federal, State, and local governments, and the public, notice and an opportunity to comment on the formulation of the 2011 Directive.

85. The 2011 Directive violates 16 U.S.C. § 1612(a). Accordingly, the 2011 Directive is arbitrary and capricious, an abuse of discretion, otherwise not in accordance with the law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706(2)(D).

### **THIRD CAUSE OF ACTION**

#### *The 2011 Directive is Arbitrary and Capricious Under the Administrative Procedure Act Because the Forest Service Lacks Statutory Authority to Issue it, and it is Not in Accordance With Law*

86. Plaintiff restates and incorporates by reference paragraphs 1-85 above.

87. The APA requires courts to set aside final agency action that is: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” “contrary to constitutional right, power, privilege, or immunity,” or adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2).

88. The 2011 Directive is final agency action.

89. The Ski Area Permit Act of 1986 specifies the compensation that the United States may demand as a condition of issuing a ski area special use permit. See 16 U.S.C. § 497c.

It does not authorize the Forest Service to demand assignment of exclusive or joint-ownership of water rights as compensation.

90. No statute grants the Forest Service authority to condition the issuance of a ski area special use permit on the assignment to the United States, or the United States' joint-ownership, of the permit holder's water rights.

91. No statute grants the Forest Service authority to restrict a water right holder's right to sever or alienate the water right as a condition of a ski area special use permit.

92. Congress and the United States Supreme Court have repeatedly stated that activities on federal lands are subject to state water law, and that water rights may be acquired only in accordance with state law.

93. No state law authorizes the Forest Service to acquire, or restrict alienability or severance of, water rights as a condition of granting a ski area special use permit.

94. The 2011 Directive is unlawful and should be set aside under the APA because the Forest Service lacks statutory authority to issue it. See 5 U.S.C. § 706(2)(C).

95. The 2011 Directive is arbitrary, capricious, and not in accordance with law because it was issued in violation of Congressional direction that water rights on National Forest System lands are subject to state law and procedures. See 5 U.S.C. § 706(2)(A).

96. The 2011 Directive is unlawful and should be set aside because it is contrary to the right under the Fifth Amendment of the United States Constitution against the taking of property without just compensation. See 5 U.S.C. § 706(2)(B).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff and against all Defendants and provide the following relief:

1. Declare that the Forest Service violated the APA by adopting the 2011 Directive without following the procedures required by 5 U.S.C. §§ 553(b), (c);

2. Declare that the Forest Service violated NFMA by adopting the 2011 Directive without following the procedures required by 16 U.S.C. § 1612(a);

3. Declare that the Forest Service may not condition the issuance of a ski area special use permit on the assignment of, or restriction of alienability or severance of, water rights;

4. Enjoin the Forest Service nationwide from acting in a manner contrary to the declarations listed above;

5. Award Plaintiff's costs and reasonable attorneys' fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and any other statute; and

6. Provide such other relief as the Court deems just and proper.

Respectfully submitted this 9th day of January, 2012.

*s/Ezekiel J. Williams*

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